

General Information Letter: Storage of inventory in Illinois is not protected by Public Law 86-272. November 4, 1998

Dear:

This is in response to your letter dated October 8, 1998, in which you request a letter ruling. The nature of your letter and the information you have provided require that we respond with a General Information Letter (GIL) which is designed to provide general information, is not a statement of Department policy and is not binding upon the Department. See 86 Ill. Adm. Code 1200.120(b) and (c) (enclosed).

In your letter you have stated the following:

The above named taxpayer is a Delaware corporation that operates in xss ssss, xxx xxxxxx and xxxxxxxxxxxx. Until now, it has never had any contact with Illinois. However, it anticipates using a public warehouse in Illinois to store goods on a regular basis. This is the only contact the corporation will have with Illinois.

We would like to know whether this alone creates nexus in Illinois, requiring the corporation to file and pay income tax. A 1994 letter ruling (copy attached) takes the position that the storage of goods in a public warehouse is sufficient to establish nexus. Unfortunately, other than stating the Department's general position, the ruling goes on to say that since the determination of nexus is extremely fact-dependent it can only be decided in the context of an audit.

We would like to know the Department's position so we can advise the taxpayer appropriately. Accordingly, I would appreciate it if you could tell me whether it is the position of the Department that the mere storage of goods in a public warehouse, without any other activity in the state, is sufficient to establish nexus. If you require additional facts to reach a determination, I would be happy to supply you with any information you require.

RULING

In your letter, you are asking whether your company has the requisite connection (nexus) with the State of Illinois, to be subject to Illinois income taxation. The determination of nexus is extremely fact-dependent. As a result, the Department declines to issue private letter rulings on the issue of whether a particular taxpayer has nexus with the State of Illinois. Such a determination may only be made in the context of an audit where the Department's auditor would have access to all relevant facts and circumstances. Although you do not specifically say so, our reply presumes that the taxpayer is engaged in the sale of tangible personal property.

The Due Process and Commerce Clauses of the Federal Constitution limit the power of States to subject foreign corporations to tax. The Due Process Clause requires that there exist some minimum connection between a state and the person, property, or transaction it seeks to tax (Quill Corp. v. North Dakota, 504 U.S.

298, 112 S.Ct. 1904 (1992). Similarly, the Commerce Clause requires that the tax be applied to an activity with a substantial nexus with the taxing state (Id.).

Under Section 201 of the Illinois Income Tax Act (IITA), a tax measured by net income is imposed on a corporation for the privilege of earning or receiving income in this State. However, out-of-state ("foreign") corporations whose only activity within Illinois consists of the mere solicitation of orders for items of tangible personal property, which orders are accepted or rejected outside of Illinois, and if accepted are filled from inventories maintained outside of Illinois by shipment or delivery from those inventories to the customer within Illinois, are not subject to Illinois income tax because of the application of Public Law 86-272.

The Illinois Department of Revenue construes this protection very narrowly. If a corporation's activities are not protected by Public Law 86-272, this "mere solicitation" standard does not apply, and the corporation's activities will make it liable for income and the additional replacement income tax for the entire year. In situations not governed by Public Law 86-272, Illinois takes the position that a foreign corporation is subject to income taxation if any of its business or nonbusiness income is apportionable or allocable, in whole or in part, to Illinois under the provisions of Section 301 through 304 of the IITA. For your information, the business income would be apportioned to Illinois under section 304 of the IITA pursuant to a three factor formula based upon the corporation's Illinois property, payroll, and sales (with the sales factor double-weighted) versus the total property, payroll and sales everywhere.

In a scenario such as you have described, it does not appear that the taxpayer's activities in Illinois are limited to the mere solicitation of orders to be accepted or rejected outside Illinois and which are to be filled from inventories maintained outside Illinois by shipment or delivery from those inventories. Thus, Public Law 86-272 would not apply.

A taxpayer's physical presence in Illinois generally provides the requisite constitutional nexus to support the State's tax (Brown's Furniture, Inc. v. Wagner, 171 Ill.2d 410, 665 N.E.2d 795 (Ill. 1996)). Such a presence exists, for example, where the taxpayer owns property located within the State (See Id.). If a taxpayer such as the one you have described intends to store goods in a public warehouse in Illinois on a regular basis, it will own in Illinois not only the property stored therein, but also a leasehold interest in real property located in this state. Accordingly, the taxpayer will have a physical presence in Illinois subjecting it to Illinois income tax.

Section 502(a) of the Illinois Income Tax Act (35 ILCS 5/502(a)) requires every person liable for Illinois income tax to file a return in this state. In addition, that section requires a corporation qualified to do business in this state and required to make a federal income tax return to file a return in Illinois regardless of whether the corporation is liable for any income tax. As to whether a corporation must qualify to do business in Illinois, please contact:

Office of the Illinois Secretary of State
Department of Business Services
Howlett Building, Room 328
Springfield, IL 62756

As stated above, this is a GIL which does not constitute a statement of policy that applies, interprets, or prescribes the tax laws, and it is not binding on the Department.

Sincerely,

Brian L. Stocker
Staff Attorney (Income Tax)

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